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NO. 96-1523

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM 1996

WILLIAM E. FOSTER
Petitioner

v.

CITY OF SOUTHFIELD, a municipal corporation,
JANET TOBIN, Personal Representative of the
Estate of ROLLIN G. TOBIN, Deceased, and
ROBERT BLOCK,
Respondent

**On Petition For A Writ of Certiorari**
**To The United States Court of Appeals**
**For The Sixth Circuit**

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# PETITION FOR WRIT OF CERTIORARI - APPENDIX B

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## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM E. FOSTER,

Plaintiff,

vs.

No. 92-75856

CITY OF SOUTHFIELD, a municipal corporation, JANET TOBIN, Personal Representative of the Estate of ROLLIN G. TOBIN, Deceased, and ROBERT BLOCK, its agents, officers and employees, jointly and severally,

Defendants.
_____/

**MEMORANDUM AND ORDER**

I.

This is an employment discrimination case tried to a jury. The background of the case and the issue tried is described in the Memorandum of June 14, 1994, a copy of which is attached. On August 4, 1994, after a twelve-day trial a jury found that

- plaintiff proved by a preponderance of the evidence that his public statements were a

substantial or motivating factor in the City of Southfield's (City) decision to terminate him.

- defendants proved by a preponderance of the evidence that plaintiff was unable to effectively perform his job duties or that the plaintiff's public statements interfered with the effectiveness of the City's operations.
- plaintiff did not prove by a preponderance of the evidence that defendants retaliated against him because of his engaging in activity protected under the civil rights law.

The jury attached to their verdict form a statement as follows:

> The way our verdict is stated, it may appear that we believe that the city is not without fault. Although we are not rewarding compensation to Mr. Foster, we feel that some city employees failed in their responsibilities as well. We hope the city looks at this statement we are making as an incentive to isolate and deal with the few individuals who are hindering the affirmative action program in the Fire Dept. as well as to encourage other city employees who are already working towards this end to continue to do so!

On August 9, 1994 a judgment dismissing the case was entered.

Now before the Court is plaintiff's motion for a new trial on a variety of grounds which will be only briefly discussed since the Court is satisfied that the motion should be denied. Plaintiff received a full

and fair trial. He had an opportunity to fully put his case to the jury. The jury was properly instructed. There are no good reasons to set aside the jury's decision.

II.

A.

Testifying at trial were John Harper, a management consultant employed by the City to assess its efforts to increase minority employment in the Fire Department; plaintiff; Kennedy Taylor, an African-American firefighter employed by the City; Valerie Crump, Equal Employment Opportunity Coordinator and personnel manager of the City; Robert Block, City Administrator; Edward DeLong, a Fire Captain; Robert Oyeas, a Fire Chief; Katherine McConnell, Civil Operations Director of the City; and David Greenwood, an African-American and one-time Fire Cadet in the City's Fire Department. Rollin Tobin, Director of Public Safety, who died prior to trial, testified through a deposition.

Numerous exhibits were received as evidence. They included evaluations, advertisements, memoranda, letters, transcripts and video tapes of new conferences broadcast on local television stations, and newspaper articles. The exhibits graphically displayed the problems the City had in recruiting minorities to work in public safety; the efforts made to employ minorities; employment of plaintiff; the course of his

employment; the difficulties encountered in integrating minorities in the Fire Department; and the actions of plaintiff which eventually caused his termination. The testimony of the witnesses and the exhibits combined to give the jury a complete picture of the relationship between plaintiff and defendants.

B.

The jury was instructed as follows:

1.

> There are three defendants in this case, the City of Southfield, which is a municipal corporation, Robert Block and the Estate of Rollin G. Tobin. For purposes of your verdict you are to treat all three defendants as a single defendant.

2.

> Plaintiff has two claims in this case. The first relates to his right of free speech under the First Amendment to the Constitution.

3.

> A public employee may express his or her views on matters of public concern in a manner which is protected by law. A public employer may not retaliate against a public employee if the employee has engaged in protected speech.

4.

A government unit such as the City of Southfield as an employer has a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large.

5.

In regulation of constitutionally protected speech a balance must be reached between the interest of the plaintiff, as a citizen, in commenting on matters of public concern and the interest of the City of Southfield, as an employer, in promoting the efficiency of the public services it performs through its employees.

6.

In proving its assertion that plaintiff's speech disabled him from performing his job, defendant must prove by a preponderance of the evidence that plaintiff's statements interfered with the effectiveness of defendant's operations or in the performance of plaintiff's job.

If the speech of plaintiff interfered with the effectiveness of defendant's operation or interfered with the performance of plaintiff's job then it is not protected speech.

7.

As to plaintiff's first claim, since his speech dealt with matters of public concern defendant has the burden of proving by a preponderance of the evidence that his speech interfered with the effectiveness of its operations or interfered with the

performance of plaintiff's job. This is the first part you must answer on the verdict form.

8.

As to plaintiff's second claim, it is unlawful for an employer to retaliate against an employee because the employee has opposed a violation of the civil rights law, or because the person spoke out, filed a complaint, or participated in an investigation or hearing under the civil rights law, or filed a lawsuit on his own behalf charging a violation of his civil rights

9.

In this case, the protected activities asserted by plaintiff are:

- Giving deposition testimony pursuant to subpoena in a civil rights lawsuit.

- Verbally opposing the violation of civil rights of minorities and women in the fire department.

- Filing a lawsuit under the civil rights law.

10.

In addition, plaintiff further contends that Defendant City of Southfield retaliated against him because of various statements he made or activity he engaged in which were protected by the civil rights laws. In order for plaintiff to prevail on his second claim he must prove by a preponderance of

the evidence:

(1) The activity he was engaged in was a protected activity.

(2) The activity was known to his employer, the City of Southfield.

(3) The City of Southfield took adverse action against Plaintiff by terminating him.

(4) That there was a causal link between the adverse action and the protective activity.

However, defendant City of Southfield asserts that it had a legitimate non-retaliatory reason for its adverse action against plaintiff. Therefore, plaintiff is required to rebut this by proving that: (a) the employer's acts were not a true reason but only a pretext and (b) the protected activity was a "significant factor" in Defendant employer taking the adverse action.

11.

A pretext is an explanation that does not convey the actual motivation or true reason for the decision.

The jury was also instructed on what is meant by a preponderance of the evidence.

III.

A.

Plaintiff says the instructions were inadequate and misled the jury as to what defendants had to prove. Plaintiff says it was reversible error for the Court not to instruct the jury that there must be "substantial" evidence that plaintiff's statements interfered with his effectiveness, that the defendants must have suffered "actual and significant harm", and that such "harm" must be "actual harm objectively determined and not merely on the basis of opinion and conjecture."

The Court is satisfied that the instructions as laid out in Part II.B. above fairly told the jury what they must find in order to answer the verdict form questions in favor of defendants and that plaintiff is really disputing sufficiency of the evidence at trial to support the jury's verdict. There was ample evidence at trial to support the jury's findings that plaintiff was unable to effectively perform his duties as Public Safety Reserve Coordinator/Fire Department once he had so bitterly and pervasively attacked the City officials with whom he was required to work and had denigrated the motives and efforts of these officials. Plaintiff's alternative instructional language would not have led the jury to find otherwise.

B.

Plaintiff says that defendants' counsel's egregious conduct, particularly his opening and closing statements, denied him a fair trial. While defendants' counsel's statements in his opening and closing statements, as well as many of the questions he asked, left much to be desired, whenever plaintiff objected and the Court was of a view that the objection had merit the jury was either instructed to disregard the comment or defendants' counsel was admonished. The question to be answered is whether the errors complained of were harmless or whether they adversely affected substantial rights of plaintiff or improperly influenced the jury. In the context of the issues and evidence and trial the Court is satisfied plaintiff's rights were not substantially affected by the conduct of defendants' counsel and that there was no improper influencing of the jury.

C.

Plaintiff's third ground for a new trial relates to the matter of witnesses. Plaintiff was denied the right to call as witnesses persons who had nothing to do with plaintiff and his relationships with defendants. Plaintiff was also denied the right to ask questions of witnesses who were called relating to matters outside of plaintiff and defendants' relationships. Plaintiff's efforts with regard to witnesses not called and questions not asked because of the Court's rulings were

directed at portraying a hostile work environment for minorities in the City generally and an environment which justified plaintiff's public statements. Certainly the witnesses who were called and the questions they were allowed to answer made clear to the jury that there were difficulties with the City's efforts to increase minority representation in the Fire Department and that there was resistance to such efforts. Those efforts, as such, were not on trial. The excluded testimony was either irrelevant or cumulative.

D.

The last ground asserted is the Court's ruling bifurcating plaintiff's whistleblower claim under the Michigan Whistleblowers' Protection Act, MSA §17.428(1) et seq. This was not an error. It did not affect plaintiff's substantive rights. It was a matter committed to the discretion of the Court. Aside from the problematic nature of the claim, evidence on the claim would have been duplicative of the evidence on the claims tried. Given the jury's verdict, plaintiff had no whistleblower claim.

IV.

Plaintiff's motion for a new trial is DENIED.

SO ORDERED.

_____

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: December 1, 1994
Detroit, Michigan